COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

DAREN MORGAN, Plaintiff/Respondent, v. JOHN FORSYTH, MELINDA BENNER, and MELCORP, INC., a Washington Corporation, Defendants/Appellants.	)	Case No. 56650-8 RESPONDENT'S BRIEF

BRIEF OF RESPONDENT

Mark G. Passannante, WSB #25680
Broer & Passannante, P.S.
Attorney for Respondent
8904 NE Hazel Dell Avenue
Vancouver WA 98665
(503)294-0910
mark@broerandpassannante.com

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INTRODUCTION

This matter comes before the Court of Appeals on defendants' Notice of Appeal from an award to plaintiff (hereinafter "Morgan") for damages arising out of the breach of a partnership agreement, breach of their fiduciary duties and wrongfully expelling Morgan from the partnership. *CP 44, pg. 3:23- 4:18.* The trial court awarded plaintiff damages in the amount of $269,133.28 together with prejudgment interest at the statutory rate, cots and attorney fees. *CP 61. pg. 1.* Defendants timely filed notice of appeal and assign error to 16 separate rulings of the trial court, that revolve around one central finding to wit: That there was no partnership agreement between the parties for the purchase and operation of Cliff's Tavern.

ANSWER TO ASSIGNMENTS OF ERROR

1. There was substantial evidence to support the trial court's finding that Morgan, defendants and Jeffrey Boltz ("Boltz") formed a partnership to purchase and operate Cliff's Tavern. *CP 44; 1:20-23.*

2. There was substantial evidence that defendants Forsyth and Benner together with Boltz formed another entity, J Squared, LLC, and agreed to purchase a lease option for the property upon which Cliff's Tavern sits as two houses and the right to operate Cliff's Tavern from MLC Ventures, LLC for $260,000.00. *CP 44 2:3-5.*

3. There was substantial evidence to support the trial court's finding

that Morgan invested $260,000.00 in exchange for a 1/3 interest in Cliff's Tavern and the lease with option to purchase the property located at 8608, 8614 and 8702 NE Saint John's Road, Vancouver WA (the "Saint John's Property"). *CP 44 pg. 1:24, 2:6-10.*

4. There was substantial evidence to support the trial court's finding that, after defendants' locked Morgan out of Cliff's Tavern, Morgan was unable to exercise the option to purchase the Saint John's Property. *CP 44, pg. 3:6-8.*

5. The trial court's conclusion that a partnership was formed by Boltz, Morgan and the marital community of Forsyth and Benner was not error. *CP 44, pg. 3:23-25.*

6. The trial court's conclusion that the partnership was formed to purchase both Cliff's Tavern and the lease option was not error. *CP 44, pg. 4: 1-2.*

7. There was substantial evidence to support the finding that defendants purchased the property located at 8608 and 8614 NE Saint Johns Road. *CP 44, pg. 4:8-9.*

8. There was substantial evidence to support the trial court's finding that Morgan is a 1/3 partner with Boltz and the marital community of defendants Forsyth and Benner. *CP 44, pg. 4:10-11.*

9. There is substantial evidence to support the trial court's finding that Morgan holds the beneficial interest in Boltz's 1/3 partnership share.

CP 44, pg. 4:12.

10. There is substantial evidence to support the trial court's finding that but for Morgan's investment of $260,000.00, defendants would not have been able to purchase the property at 8608 and 8614 NE Saint Johns Road. *CP 44, pg. 4:13-15.*

11. There was substantial evidence to support the trial court's finding that defendants breached their partnership agreement and fiduciary duties as partners by unlawfully expelling Morgan from the partnership and pursuing a partnership opportunity for themselves. *CP 44, pg. 4:16-18.*

12. There was substantial evidence to support the trial court's finding that Morgan initially invested $260,000.00 for the purpose of purchasing Cliff's Tavern and an option to purchase the Saint John's Property. *CP 61, pg. 2:6-8.*

13. There was substantial evidence to support the trial court's finding that defendants excluded Morgan from their purchase of the property located at 8702 and 8608 NE Saint Johns Road. *CP 61, lines 12-14.*

14. There was substantial evidence to support the trial court's finding that defendants used partnership funds for their own purposes, expelled Morgan from Cliff's Tavern and the purchase of real property and that defendants breached their fiduciary duty to Morgan amounting to constructive fraud and entitling Morgan to his reasonable attorney fees. CP 61, pg. 2:16-19.

15. There was substantial evidence to support the trial court's finding that Morgan is entitled to rescission damages in the amount of $260,133.28. *CP 61, pg. 2:20.*

16. There was substantial evidence to support the trial court's finding that Morgan was denied any benefit of his investment effective June 30, 2019 and entitled to prejudgment interest on the damages award. *CP 61, pg. 2:21-22.*

RESPONSE TO ISSUES PRESENTED

Other than assignment of error 5 and 6 which are conclusions of law, all assignments of error relate to the court's factual findings. Errors of law are reviewed de novo. *Fluke Corp. v. Harford Accident and Indem. Co.*, 145 wn2d 137 (2001). The standard of review for factual findings is whether there is substantial evidence in the record to support the finding claimed as error. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "Substantial evidence" exists when there is a sufficient quantum of proof to support the trial court's findings of fact. *In re Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). In a partnership action, the standard of proof is a preponderance of the evidence. *See Eder v. Reddick*, 46 Wash 2d 41, 278 P2d 361 (1955). "Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact." *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App.

710, 717, 225 P.3d 266 (2009).

STATEMENT OF THE CASE

Factual Background

In or about August 2017, MLC Ventures, LLC ("MLC") purchased "Cliff's Tavern" from L.W. Stephens, Inc., the owner of Cliff's Tavern. *TR 387-388, Exhibit 101.* The principal of L.W. Stephens, Inc., Larry Stephens was also the trustee of his family trust which owned the real property upon which Cliff's Tavern sat together with neighboring property. *See generally CP 38, Exhibit 102.* MLC purchased Cliff's Tavern (hereinafter referred to as "Tavern") for $100,000.00. *TR 387-388, Exhibit 1.* MLC put $40,000.00 down on the purchase and agreed the $60,000.00 balance of the purchase price over time. *Id.* The Tavern was operating when MLC purchased the business but was shut down shortly thereafter by Canton. *TR 387.* The lease executed by MLC for the property called for monthly rent of $3,000.00 to start on January 1, 2018 and then graduated to $4,000/month the next year. *Exhibit 2.* The lease provided that the MLC would use the Property as a Tavern, rentable houses as commercial and RV Storage. *Id.* The lease included an option to purchase the Property in September 2019 for $1,000,000.00. *Exhibit 3.* The price of the option was $25,000.00 payable in two payments of $12,500.00 each. *Exhibit 4/*

Jeff Boltz, who described himself as a gaming consultant who had

previously owned the 3 Monkeys bar in Vancouver, Washington became aware that the land and bar were for sale in 2017. *TR 288, pg. 288: 6-8, 16-19.* Boltz became aware that MLC had purchased Cliff's Tavern with a lease/option on the Property because of a third party, Aaron Vazquez ("Vazquez"), who had informed Boltz that he going to be purchasing and remodeling Cliff's Tavern for re-opening but had run into financial problems with the deal. *TR 290:9-20.* Thereafter, Boltz met with MLC's principal Mike Canton ("Canton") initially to try and mediate the dispute that had arisen between MLC and Vazquez. *TR 290-291:9-2.* During that meeting, Canton told Boltz that he was no longer interested in selling to Vazquez because Vazquez had changed the locks to Cliff's Tavern and instead asked Boltz if he was interested in the opportunity. *Id.*

At that meeting, rather than mediate his dispute with Vazquez, Canton inquired with Boltz to determine if Boltz was interested in what Canton described as the opportunity as a purchase option for the Property and also finish the remodel and re-opening of Cliff's Tavern. *TR 291:3-9.* Boltz was interested and arranged to have a second meeting with Canton. *TR 291: 17-20.* At the second meeting, Canton described the relationship of the Property, Cliff's Tavern as well as the Stevens Family Trust (which owned the Property) and wrote up a letter of intent. *TR 299-292:22-17; Exhibit 6.* Canton also provided Boltz with copies of the business purchase agreement with LW. Stephens, Inc., together with the lease for

the Property and option to purchase the Property. *TR 292-293:6-21.* Boltz described his understanding of the letter of intent with MLC as a joint venture to buy the Property to see what could be done with it for development and to get Cliff's Tavern up and running again and confirmed that is how Canton explained the proposed venture notwithstanding the reference in the letter of intent to the land and family trust but, not LW Stephens, Inc. *TR 294:3-10; TR 296:3-11.* Thereafter, Boltz went in and took over remodeling the bar and finding tenants for the two houses on the Property. *TR 296-297:12-12.*

Boltz then approached defendant John Forsyth ("Forsyth") about joining his venture with Cliff's Tavern and the Property who agreed to join in the venture. *TR 297-299: 13-8.* Boltz and Forsyth agreed that Boltz would fund the remodel of the bar and Forsyth's contribution would be sweat equity. *Id.* Boltz and Forsyth, however, had a problem with opening the Tavern as neither of them could obtain liquor licenses at the time they were remodeling and preparing to re-open Cliff's Tavern. *TR 298-299: 22-25.* This issue was solved by enlisting Forsyth's wife, defendant Melinda Benner ("Benner") who agreed to form defendant Melcorp Inc. ("Melcorp") and obtain liquor and gaming licenses for the partnership that would eventually get transferred to the partners. *TR 300:1-6, TR 300-301: 14-10.* Plaintiff, Daren Morgan ("Morgan") was not yet involved in the project. *TR 300:7-13.* During this time though, MLC

desired to discontinue its partnership and Canton and Boltz began discussing an exit for MLC from the venture. *TR 301-302 11-8.* Boltz and Canton exchanged emails which later formed the basis of MLC's exit. In the email, Canton offers to sell off his interest for "$260,000.00 cash with $60,000 going to Larry for the tavern business and $200,000 going to me for my option." *TR 302-303:14-10, Exhibit 40.* Boltz accepted. *Id.* Of note, Canton encouraged the terms of purchase by noting if he gave $60,000 to "Larry for the Tavern business" you would only need to pay $3,000/month to the trust and you are free to do whatever you want there. *TR 303: 2-5.* MLC and J Squared Invetstments, LLC ("J Squared"), an entity set up by Boltz and Forsyth eventually executed an assignment of the lease and purchase option with MLC and completed the purchase of the venture. *TR 308-310: 22-2, Exhibit 7.* Boltz and Forsyth paid MLC the $260,000 cash after obtaining it from Morgan. *TR 309: 20-22.* MLC used the money to pay off the balance of purchase price of the business, Cliff's Tavern owed to LW Stephens, Inc. *TR 310-311: 19-4.*

Morgan used to work in the robotics and semi conductor industry until he bought a local bar, Top Shelf in or about 2013. *TR 51-52, 25-8.* Top Shelf, LLC was single member LLC which Morgan owned and established to operate the Top Shelf bar from 2013 until it closed during the Covid-19 pandemic. *TR 55:2-8.* Boltz had met Morgan a few years earlier when Morgan was interested in purchasing the 3 Monkeys bar. *TR*

288-89, 23-1. Boltz and Morgan became social friends over the years sharing and interest in motorcycles. *TR 289: 2-22.* Morgan had known Forsyth for 5 or 6 years as well and considered Forsyth a friend and met a 3 Monkeys bar as patrons. *TR 55: 17-23.* Forsyth, Benner and Morgan were close friends who had vacationed together in the past and also shared an interest in motorcycles and Morgan going to dinner at the Forsyth/Benner house. *TR 57: 8-14.* Morgan believed he could trust Forsyth and Benner. *TR 57: 15-16.*

Forsyth originally approached Morgan about partnering in the business and option. *TR 308:8-11.* Forsyth told Morgan that he could be a part of their plan to buy the Tavern with a lease option on the property upon which the Tavern sat as well as two neighboring parcels. *TR 59:2-8.* Forsyth told Morgan that he and Boltz needed Morgan to come up with the $260,000 cash to buy out MLC from the business and property. *TR 59, TR 61:13-20.* Forsyth did not bring any of the agreements between MLC and the Stephens family or MLC and J Squared for Morgan to review. *TR 60:2-3.* Boltz later joined Forsyth and Morgan and the three of them went to the Property. *TR 61-62: 24-8.* The conversation for the bar centered around remodeling the bar and then the partnership would own the bar. *TR 62:9-19.* The parties agreed that Morgan would put up the $260,000.00 for a 1/3 interest in Cliff's Tavern and the lease option for the Property. *TR 62-63: 13-25.* Neither Boltz nor Forsyth provided Morgan

with a copy of the agreements between MLC and the Stephens' Trust or LW Stephens, Inc. TR 62-65. There was no written partnership agreement between Morgan, Boltz and defendants. *TR 308: 19-21.*

In February 2018, Morgan obtained a loan using his home as collateral to fund the partnership and buy out of MLC a hard money lender, Clunas Funding ("Clunas"). *TR 75-78, Exhibit 8.* In the application for the loan from Clunas, Morgan disclosed the purpose of the loan was to purchase a tavern, which Morgan identified as Cliff's Tavern. *TR 77: 15-21, Exhibit 8.* The loan was approved and Morgan deposited the money in the only checking account he had at the time, the one for his limited liability company, Top Shelf, LLC. *TR 74-75: 22-19, Exhibit 9.* Morgan was personally responsible for repayment of the loan and the money was Morgan's individual property. *TR 78.* The checks were delivered to Forsyth to repay an advance used for part of the purchase price from a third party and then to MLC. *TR 79-82: 5-16.*

Thereafter, Morgan assisted with purchases for Cliff's Tavern and the remodel, expending additional sums for materials, supplies and some furnishings and helping with the remodel and contributing additional funds to cover rent for the Property prior to the houses being rented and Cliff's re-opening. *TR 88-93:19-23.* Morgan spent an additional $9,133.12 for materials, equipment and to form a successor limited liability company to transfer Cliff's into after its re-opening. *TR 95-104, Exhibit 21, Exhibit*

23. Morgan continued to assist with day-to-day operations at Cliff's Tavern, after its opening for approximately another 6 months and thereafter continued his involvement as a partner on a more limited basis until defendants locked him out of the business. *TR 111-112, TR 121-122: 25-22..* At some time before being locked out of the business, Morgan was frozen out of the accounts for Cliff's Tavern. *TR 122-123: 23-9, TR 127.*

Morgan was aware that Benner had already formed Melcorp to obtain liquor and gambling licenses for Cliffs and agreed, along with Benner and the other partners, that Melcorp would hold the liquor and gaming licenses for the partnership until the partners could obtain their own liquor and gaming licenses and, when that occurred, Melcorp would transfer operations of Cliff's Tavern to the partners or their designated entity. *TR 72-74:22-5.* Benner testified that her intent in opening Melcorp was to operate Cliff's Tavern indefinitely. *TR 462-463:25-3*. Benner later admitted though, that she had not paid anything to purchase the business Cliff's Tavern. *TR 14-20.* In addition, Benner admitted to deleting text messages between her and Morgan that she claimed would show that she was trying to get Morgan to leave her alone. *TR 493-494: 23-15.* Benner made this admission when faced with text messages retained by Morgan from April - June 2019 wherein Benner agreed that she was going to transfer Cliff's Tavern to the partnership. *TR 493, Exhibit 25.* Benner

claimed on the stand that she was lying to Morgan at that time. *TR 497:18-19.* Boltz testified, consistent with Morgan, that the partners agreed that Benner would transfer the operation of Cliff's Tavern. *TR 317:6-14.* Boltz, Morgan and Forsyth likewise met with a local attorney Douglas Whitlock to discuss transfer of Cliff's Tavern at several meetings. Forsyth did not voice any objections to the partnership plan to transfer Cliff's Tavern from Melcorp. *TR 317-318: 21-14.*

Shortly after Morgan joined the partnership, the two houses that came with the Property were rented for $1,500.00/month each. *TR 141-142:23-19.* Morgan never received a dime in rent from the two houses. *Id.* Morgan never received any rent payment from Melcorp. either. *TR 129:14-15.* In addition, during the time that Morgan had access to the books and records of Melcorp. Morgan discovered that defendants Benner and Forsyth were misappropriating operating income for their own personal benefit and that cash had been taken from the gaming till and not put in the business checking account. *TR 147-156, Exhibits 14, 19 and 23.* The discrepancy between cash received at Cliff's and sums deposited into the operating account for Cliff's was $14,332 that was never accounted for by defendants. *TR 156 18-22, Exhibit 23.*

In March 2019, Boltz transferred his beneficial interest in Cliffs to Morgan. *TR Exhibit 31.* In or about April to June 2019, the parties were still discussing transferring the business. The partners had met at 3

Monkeys Bar and got into an argument over repayment to Morgan by Forsyth for money lent to Forsyth to purchase Cliff's Tavern. *TR322: 2-25, TR 142-146.* The dispute erupted into an argument wherein, Forsyth and Benner, upset about the cost of three monkeys went to Top Shelf and threw the check owed to Morgan for the purchase. *TR 146:2-10.* This occurred right about the same time that Morgan was locked out of Cliff's and Morgan was locked out no later than July 8, 2019. Id., *TR 127-128: 11- 7, Exhibit 25,* Morgan was never restored to possession of the Property after the lockout. *TR 146:16-19.*

Neither Morgan nor the partnership exercised the option to purchase the Property on the strike date called for in the lease/purchase option (September 2019). *TR 168:3-5.* Morgan likewise testified that, had he been able to continue operating Cliff's Tavern, he would have been in a position to exercise the option with the partnership. *TR 168:6-12.* After, the option expired, defendants continued to rent the Property from Stephens and approximately 3 months after expiration of the partnership option, Forsyth and Benner purchased a portion of the Property through an LLC for which Forsyth and Benner are the sole members (JM Investing Company, LLC) for $800.000.00 with $80,000.00 down. *TR 168-169, Exhibit 39.* The purchase price for the property upon which Cliff's sits upon plus one of the two rental houses was the exact same as the strike price on the option for that portion of the Property. *Exhibit 38, Exhibits 2-*

4. Morgan testified that, given the financial performance of Cliff's, the partnership would have had the financial ability to purchase the property on the same terms and conditions as the Stephens family agreed to sell the property to defendants Forsyth and Benner. *TR 171.* After the purchase, Cliff's Tavern began making $4,000/monthly rent payments to JM Investing Company, LLC. *TR 174.* Prior to Morgan's lockout, Cliff's was paying $4,000.00 per month in rent. *See Exhibit 17* (2019 rent expense listed at $45,914.00).

ARGUMENT

Standard of Review

The standard of review is not abuse of discretion whether there is substantial evidence in the record to support the finding claimed as error. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "Substantial evidence" exists when there is a sufficient quantum of proof to support the trial court's findings of fact. *In re Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). "The trial court's finding of fact that Eder and Reddick had entered into a partnership agreement is not to be set aside unless we find that it is contrary to the preponderance of the evidence." *Eder v. Reddick*, 46 Wash 2d 41, 278 P2d 361 (1955) *citing Minder v. Gurley*, 37 Wash 2d 123, 222 P2d 185 (1950). "A decision is based on untenable grounds when its factual findings are unsupported by the record. Id. (*quoting Lamb*, 175 Wn.2d at 127). We review findings of

fact for substantial evidence," which "'exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Haag*, 198 Wash 2d 309, 317 495 P3d 241 (2021). (citing *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014), and *quoting State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

1. The trial court's finding that MLC sold Cliff's Tavern is supported by evidence in the record.

While, appellants cite the correct standard of review for assignments directed at findings of fact. Appellants do not provide the court with the factual record but, rather, cherry pick certain testimony quoted within the brief without identifying any other testimony or evidence in the record and analyzing why such evidence is insufficient to meet the substantial evidence standard. Instead, appellants only identify testimony and evidence in the record that the Court did not accept and argue that the trial court should have accepted such evidence as defining Morgan and defendants relationship to the Property and Cliff's Tavern. It is important because appellants have only cited to instances in the record where they believe testimony or evidence in supports their position and argue only that the Judge ignored their evidence. *See generally Appellants' Opening Brief, pg.* . Thus, leaving it to Respondent to then identify the evidence in the record but to respond when appellants file their

reply brief where appellants, presumably, will then argue why the countervailing evidence is not evidence of the fact at issue. *See RAP 10.3.*

> As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument. See RAP 10.3. For the most part counsel has not done this.
>
> Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.
>
> As noted above, appellant does assail the trial court's findings of fact 21 and 82 and he cites to portions of the record in support of his argument. In those findings, the trial court indicated that the degree of Estelle's receptive aphasia (impaired comprehension) was "clearly and persuasively" described by Dr. Capwell who, the trial court found, relied on mental status tests that Estelle failed. Appellant does not suggest that Dr. Capwell did not so testify, but merely points out that Dr. Capwell's testimony was refuted by Christian's expert witnesses. As respondents correctly point out, where there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding. *Miller v. Badgley*, 51 Wn. App. 285, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988). Viewing the evidence in that light we can say that the findings survive challenge. We, therefore, consider these findings and the

> others, all of which were either not challenged or were challenged improperly, as verities. *Murphy v. Lint (In re Estate of Lint)*, 135 Wash 2d 518, 534 957 P2d 755 (1998).

Here, all that appellants have done is cite to testimony and documentary evidence and argued the trial court should have believed defendants when they took $260,000 from Morgan, opened a bar for themselves then bought property that was intended to benefit not only defendants (including the marital community) but also Morgan then shut him out when they decided they did not like him anymore and buy a portion of the property that the partners were to buy together? Never have two friends done so little for another friend and been so proud. Because appellants have failed to offer any argument beyond the trial court should have accepted different evidence than it did, this assignment of error should be denied.

Even if the Court does not deny the appeal for failure to adequately address appellants claimed errors, there was plenty of evidence demonstrating that MLC sold both the business and lease option. Specifically, the evidence supporting that the business was sold with the lease and option is outlined on page 5 of this brief with citations and include that 1. MLC was originally partnering with Vazquez. *Infra.*. 2. Vazquez started remodeling the bar. *Infra*, 3. Boltz testified that the deal always included the bar. *Infra*. And of course, the email Canton sent to Boltz when negotiating the deal stating that if Boltz paid him $260,000.00,

"with $60,000 going to Larry for the tavern business and $200,000 going to me for my option, and I would be out of the picture." *TR 302-303:24-1, Exhibit 40.* Which Canton doubled down on by saying, 'If Larry is paid off, then your payments to the trust are only $3,000.00 per month plus property tax and insurance....." *TR 303:2-4, Exhibit 40.* While maybe not enough for summary judgment, it is close and certainly substantial evidence in the record that MLC intended to and did sell Cliff's Tavern. If Canton had not sold Cliff's Tavern, what difference would it make what Canton did with the $260,000 since whether he paid off the bar purchase or not, it would have no impact on the payments the buyers payment obligation. And even more to the point, if as Canton later claimed, Boltz had no interest in owning a bar, a pretty straight forward response to that email would have been, obviously, 'Okay, we will take the option for $200,000 but have no interest in the business and.... of course, then nothing would have been done to remodel the bar by Morgan or Boltz or anyone else.

In short, because appellants failed to address its arguments to the evidence in the entire record but rather only argued that the trial court erred by ignoring their self-serving testimony and Canton's inconsistent testimony and the record includes substantial evidence that the sale by MLC included the Cliff's Tavern should be rejected.

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2. The trial court did not error by concluding that plaintiff, Boltz and the marital community of Forsyth and Benner for the purpose of purchasing both Cliff's Tavern and the lease/option on the Property was not in error.

The appellate court defers to the trier of fact when it needs to resolve conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).

"We have stated that the fundamental test for determining the existence of a partnership is whether it was the intention of the parties to form a partnership as manifested in their express agreements, statements and conduct." *Stipcich v. Marinovich*, 13 Wn. (2d) 155, 160, 124 P. (2d) 215 (1942).

In *Nicholson v. Kilbury*, 83 Wash. 196, 145 Pac. 189, this court stated:

> There is no arbitrary rule by which it may be determined whether a partnership relation existed in a given instance or not. The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. The existence of the partnership may be implied from circumstances, and this is especially true where, as here, the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common venture but is in the main inconsistent with any other theory. *Bridgman v.*

Winsness, 34 Utah 383, 98 Pac. 186. It is well settled that no one fact or circumstance will be taken as the conclusive test. Where, from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established. *Minder v. Gurley*, 37 Wash 2d 123, 129-130, 222 P2d 185 (1950).

Consistent with the above is RCW 25.05.055 which provides:

1) Except as otherwise provided in subsection (2) of this section, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.
(2) An association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter. *RCW 25.05.055(1) (2).*

Stipcich is illustrative on its facts.

In addition to these statements, the evidence also disclosed that respondent managed the kitchen, kept the time of and paid the help, counted the money each day, purchased some of the supples, discussed the problems of the restaurant with appellant, and signed the checks. Appellant, on the other hand, purchased most of the supplies, occasionally worked in the restaurant, and attempted to promote the business. Moreover, a representative of the accounting firm that kept the books of the restaurant testified:

"Q. In setting up these books, were they kept as a corporation or as a partnership? A. They were set up under the law as a corporation, but kept as a partnership."

With regard to the written agreement, on first reading, the terms "stock," "California Oyster House, Inc.," and "corporation" might cause difficulty. Yet it must be remembered that the relationship of the parties is not controlled by the name of the arrangement or by certain terms and labels. On the contrary, it is the substance derived from all the circumstances which determines their legal relations toward each other. *Id. quoting Styers v. Stirrat & Goetz Inv. Co.*, 65 Wash. 676, 118 Pac. 896 (1912).

> A close analysis of the instrument, together with the surrounding circumstances, will disclose that the corporation factor is immaterial so far as determining if a contract of partnership existed. But even if it were considered, the existence of such a business association would not militate against the existence of a partnership as between the parties. It is quite obvious that a partnership may have as its assets the majority stock of a corporation without a resultant change in either type of business association. In the case at bar, however, respondent at no time received a share of stock. *Id. at 161-162.*

Here, while appellants argue that the parties were part of a limited liability company, appellant ignores the fact that the un-controverted evidence was that Morgan was never a member of J Squared Ventures, LLC. In fact, in appellants' own brief acknowledges that, when asked, Boltz testified that neither Morgan nor Forsyth were members of J Squared Ventures, LLC. *TR 331:10-17, TR 332:10-12.* Morgan confirmed that he was not a member J Square Ventures, LLC . *TR 2126:2-3.* And when queried, Morgan reiterated that he did not invest in J Square Ventures, LLC he invested in the partnership. *TR 226:2-3; TR 240:14-15.* While, dressed up as an assignment of error to the conclusion of law that a partnership was formed, appellants are really challenging how the trial court weighed evidence. If Morgan and Forsyth are not members of J Squared Ventures, LLC and had nothing to do with its formation, *RCW 25.05.055(2)* is inapplicable because the association of partners did not, in fact, form an association comprising of the parties as members. In addition, while the name J Squared Ventures, LLC was thrown around a lot, there was no evidence in the record that the "company" was formed under any WA statute. If the trial court

believed the testimony and evidence that Morgan and defendants were not members of J Squared Ventures, LLC, then appellants entire argument that it was legal error to conclude that no partnership was formed because the parties had formed a limited liability company under RCW 25.15 comes falling down like the house of cards that it is.

As it relates to whether the partnership was formed to purchase and operate the bar, the substantial evidence needed to support that conclusion is on page 37 of appellant's opening brief. Morgan testified that Forsyth approached him about a partnership he had with Boltz and Canton. Specifically, that they were in the process of remodeling Cliff's Tavern but that Canton wanted out and that once remodeling was done, the bar would be owned by the three partners. *TR 1, 62:13-20.* There is no evidence of any other legal entity with Boltz, Forsyth and Morgan as its owner which is the premise of appellants entire argument that the Court erred as a matter of law that a partnership was formed for the purpose of buying and operating Cliff's Tavern with a lease option for the Property. In addition, Morgan went to and did work on both remodeling and operating Cliff's Tavern and expended an additional approximate $9,000 of his own money on remodeling, operating Cliff's Tavern and later forming another entity into which Cliff's was intended to be transferred but never occurred because Morgan was locked out. *Response Brief, pg. 6 infra.*

In short, Morgan was never provided nor did he see Exhibits 1-4 until after the litigation began. *Infra.* Morgan paid $260,000 to Forsyth which eventually

got to MLC to buy into the partnership, $60,000 of which went to Larry Stevens for the business so the partnership would only have to pay $3,000.00 per month to the trust. *Infra.* The transaction worked out just as Canton's email outlined for the sale of the business and option. Canton received the $260,000.00, paid $60,000 to Larry Stevens to pay off the remainder of the Tavern business. *TR 396:22-25.* If Canton, only sold the option then he should have only taken $200,000 and, when looked at rationally, the trial court's conclusion is obviously correct, despite defendants obfuscation. If the business is not being bought why would the fact that Canton paying off the business purchase that he 'was not selling' have any impact on how much the partnership had to pay going forward? Again, it would not. It would be irrelevant. There is substantial evidence that the parties formed a partnership for the purpose of purchasing Cliff's Tavern and a lease option on the Property, appellants don't like that evidence but arguing that the trial court should have ignored evidence they did not like is not a valid reason for remanding this matter back to the trial court.

3. The trial court did not err as a matter of law by concluding that Boltz and Forsyth and Benner, rather than J Squared Ventures, LLC entered into an agreement with MLC Ventures.

First, it is disputed that J Squared Ventures, LLC controlled all funds. This is a statement made with no factual support. Morgan got funds from the refinance of his home and gave the money to Forsyth who then delivered the money to MLC and other people who had advanced a down payment. *Infra, pg.*

8. There is no evidence that J Squared Ventures, LLC controlled all funds.. Unless appellants meant all funds except the funds that it did not control. Second, appellants again ignore that neither Morgan nor Forsyth were members of J Squared Ventures LLC and there is nothing in the record that J Square Ventures, LLC was formed by the parties under the Washington (or any other states) limited liability company.

Appellants also ignore that Morgan neither knew of nor did he see the various agreements entered into by MLC and then J Squared Ventures LLC. Morgan was told he was buying into a partnership for the purchase and operation of a tavern and lease option for the Property. And importantly, defendants have not been named a party because of the liability that J Squared Ventures, LLC may owe but, rather, for their own conduct in entering into a partnership with Mr. Morgan and then breaching their fiduciary duties to him. Appellants again conveniently forget that they were not members of J Squared Ventures, LLC. They were named because Forsyth agreed with Morgan to the partnership Morgan described and did so on behalf of his marital community. Benner, at a minimum joined the partnership as a community asset and ratified Forsyth's conduct by agreeing to hold Cliff's in trust essentially because she could get a liquor license at the time and to then transfer the business to the partners. The evidence is substantial that this was the agreement and not just with testimony but actual statements and writing of the parties made at the time, including Benner's text message to Morgan which Morgan was able to find despite Benner's spoliation of

the evidence of other text messages she claimed clarified her repeated promises to transfer Cliffs. *Infra. pg. 9.* Appellants once again ignore evidence that they do not like and provide insufficient analysis of the factual record to provide meaningful review of the factual findings and once again argue that the trial court should have listened to them and... if it had, things would be different. Appellants are wrong, the trial court listened to what defendants had to say, clearly concluded that defendants were not credible with Benner even admitting that she lied to Morgan because he was 'harassing her.' The truth is 'Saint Benner' was not being harassed, she was being asked to do what she promised originally and when she reneged, she calls Morgan a harassed. That takes the cake but fortunately the trial court saw through Forsyth's and Benner's prevarication and concluded that Morgan's evidence was more persuasive and, it was substantial that he Boltz and the community of Benner/Forsyth did form a partnership for owning and operating Cliffs and the lease/option for the Property.

4. Appellants have failed to adequately address the claimed error that the trial court erred as a matter of law by failing to find that Top Shelf, LLC (a wholly owned limited liability company of Morgans) made the investment.

This assignment is mystifying. Morgan testified that he obtained a personal loan on his personal residence to come up with the money for the partnership investment. *Infra pg. 6 and 8, respectively.* Morgan testified that he put his money into the Top Shelf, LLC account for convenience and that he viewed the investment as his personal investment, not an investment of Top Shelf,

LLC. Appellants once again suffer from a lack of analysis. Appellants fail to identify the evidence that supports the trial court's finding and fails to argue what such evidence is insufficient. As with the first assignment, this failure alone is grounds for rejecting the claimed assignment as appellants brief does not comply with RAP 10.3. Further, the citation to evidence by the appellants is misleading in an apparent attempt to infer that Top Shelf, LLC was established for the Saint Johns transaction. Curiously, appellants leave out the testimony just before the question about why Morgan holds his other business in an LLC, specifically that it was formed in 2013. *TR 185: 10-15.*

There is substantial evidence that while the money used to fund the investment went through the bank account of an LLC, there was no evidence that this was done other than for convenience and no evidence that Morgan intended his LLC to be in the partnership. Ignoring evidence does not assist appellants. The fact that Morgan used his personal funds to make the investment but, utilized the account of his LLC to transfer the money to Forsyth and then MLC, does not convert the money to property of the LLC. *See generally Smith v. Fitch*, 25 Wash 2d 619, 171 P2d 682 (1946) (money belonging to the first party but held by the second party for the first party is not property of the second party, a resulting trust is created).

Once again, appellants argument is hollow. Appellants ignore evidence that the $260,000 was obtained by Morgan on a refinance of his personal home and put in the Top Shelf LLC account for convenience. Fortunately for Morgan,

his solely owned LLC knew that the money was not put in its account by its only member for the company's use but, rather for Morgan's personal use. He dodged a bullet there by not having to sue his own LLC for a resulting trust. If there is substantial evidence that the money was either intended as a distribution to Morgan personally or sourced from Morgan personally, the finding must stand. There is. And appellants offer absolutely know cognizable legal authority that the mere fact that money came from a bank account owned by an LLC belongs to an LLC as a matter of law. A ridiculous contention as the sole legal authority offered by appellants is an LLC is a distinct legal entity thus any money coming from that account, regardless of its source or the sole member's intent, belongs to the LLC as a matter of law. That is not even a correct statement of the law for joint bank accounts.

5. Substantial evidence supports the trial courts finding that the partnership was unable to exercise the option to purchase the Property by the lock out.

Appellants once again, do not describe any evidence that supports this trial court finding and offers no argument as to why that evidence is not substantial enough to support the finding. Instead, appellants identify testimony that they believe favors their position and then argue that the trial court should not have ignored appellants chosen evidence. That is insufficient argument and support for a claim of error. As detailed in the argument in opposition to the first assignment of error, pointing to evidence that if believed, would support appellant's asserted

factual finding is insufficient to overturn the trial court's actual fact finding. Rather, appellant cannot just point to the evidence that appellant believes should have been considered but affirmatively demonstrate to the court that no substantial evidence in the record supports the challenged factual finding. Appellants failed to make such argument or identify the contrary evidence and argue why such evidence is insufficient to meet respondent's burden of proof.

Appellants ignore the finding that Morgan was locked out of the business on or about June 30, 2019 by appellants. This was not less than 60 days prior to the strike date on the option. Morgan testified that, had he been able to continue in the partnership operating the bar, he would have been able to exercise the option. *TR 168:6-12.* And, we know from the undisputed evidence that Forsyth and Benner formed another LLC that purchased 80% of the property under option for the exact price that the partners held the option for that portion of the property. *See Exhibit 4, Exhibit 38.* That is substantial evidence from which a rational person could infer, but for the lockout and exclusion from the tavern operation, the partnership would have been able to exercise the option.

Lastly, appellant fails to identify the harm caused even if there was error. The Court did not award Morgan profits and restore him to the partnership or grant a resulting trust in the property Forsyth and Benner ultimately purchased, it awarded restitution damages due to appellants breach of the fiduciary duties and wrongful conduct. Whether or not the option could have been exercised by the partnership does not impact the amount of restitution as Morgan obtained

judgment not for profits but rather, his money back that was wrongfully appropriated by Forsyth and Benner for their own personal gain rather than the benefit of the partnership.

6. Substantial evidence supports the conclusion that Morgan holds the Boltz's beneficial interest in the partnership.

Once again, appellants fail to acknowledge critical evidence that supports the finding by merely identifying evidence that appellants believe should have been given more weight. Specifically, *Exhibit 31* is consistent with the finding of fact that Boltz transferred his interest in the partnership to Morgan's LLC. Appellants take no issue with the finding of fact that Boltz transferred his 1/3 partnership interest to the LLC. The trial court did not hold that the transfer was directly to Morgan, the trial court held that the transfer was to Letterman Jacket LLC and appellants take no issue with that finding. (Finding of Fact #7). Instead, appellants take issue with the trial court's conclusion that Morgan held the beneficial interest in the Boltz 1/3 interest. Instead, appellants confuse entitlement to the beneficial interest which they do not argue with the actual transfer of the interest, which the trial court found went from Boltz to Letterman Jacket, LLC.

As with the argument under 5, above, even if this was an error, it is harmless as the trial court awarded Morgan restitution damages, not lost profits. And, finally, appellants waived the defense by failing to raise it in their answer. Evidence or argument at trial of real party in interest or standing is insufficient to preserve the issues for appeal. *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947,

950, 425 P.2d 902 (1967). Appellants' failure to specifically identify the defenses and provide legal citations in support of the defenses precluded the trial court from intelligently considering the defenses. *Id.* The appellate court need not consider on appeal a theory that the lower court had no effective opportunity to consider and rule upon. *Commercial Credit Corp. v. Wollgast*, 11 Wn. App. 117, 126, 521 P.2d 1191 (1974).

7. Benner and Forsyth breached their fiduciary duties to Morgan and obtained a partnership opportunity for their own benefit.

This assignment is puzzling. The trial court did not find that Benner and Forsyth purchased the portion fo the property that they did individually. Factually, it is true that Benner and Forsyth formed their own separate LLC and used that LLC to purchase the property upon which the parties had an option. The property that the bar sits on was, naturally sold to an entity owned by the people running the bar. It is the wrongful appropriation of the partnership interest that is the gravamen of the complaint. Appellants argue but provide zero legal support for their wild contention that they can subvert a partnership opportuntiy by forming another company that they also own and then using that company to take the corporate opportunity. Importantly, appellants do not assign error or argue that the right to purchase the Property or a portion of that property was a partner opportunity. Without providing any legal support for their legal contention that individual partners may subvert partnership opportunities to their own personal gain, as long as they first form a distinct legal entity and then steal the

opportunity, the respondent is not given a meaningfully opportunity to review and respond to the proposition and the appellate court need not decide an issue that has not been legally supported by the appellant. "The general contractor assigns error to the trial court's findings of fact and other determinations but does nothing to support them. HN9 When an issue is not argued, briefed, or supported by citation to the record or authority, it is generally waived. The general contractor's contentions also have no merit." *Keever & Assocs. v. Randall*, 129 Wash App 733, 119 P3d 926 (2005)*citing Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 778-79, 37 P.3d 354 (2002); RAP 10.3(a)(5).

Just like the general contractor in *Keever,* appellants have hit the Exacta - waiving an argument not supported with legal authority and the contention has not merit. This assignment should be denied as well.

Attorney Fees

Morgan requests an award of attorney fees on appeal. Partners stand in a fiduciary relationship to each other and have an obligation to act in the utmost good faith. Every partner must account to the partnership and hold as trustee for it any benefit or profit from any transaction connected with the liquidation of the partnership. *Green v. McCallister*, 103 Wn. App. 452 (2000). There are two theories that give rise to an award of attorney fees, a common fund doctrine (not applicable here) and when the breaching partners commit constructive fraud. ".... the innocent partner is entitled to his fees if the conduct constituting the breach violates the partnership agreement, or is "tantamount to constructive fraud." *Hsu*

Ying Li v. Tang, 87 Wn. 2d 796, 801 (1976); *Brougham v. Swarva*, 34 Wn. App. 68, 72,(1983). "A partner should share the expense of a lawsuit when he breaches his fiduciary duty to the other partners." *Tang, Id.*

Appellants engaged in constructive fraud and, as found by the trial court and breached their fiduciary duty to plaintiff. Appellants did not contest the factual finding that Morgan was locked out of the partnership on or about June 30, 2019. It is a verity on appeal. *See Murphy, infra.* And, while appellants challenged the finding that purchasing some of the property subject to the option breached a fiduciary duty owed to plaintiff, the sole contention made by appellants was that they formed a distinct LLC to purchase the property and thus, they did not individually do anything wrong by forming their own company to purchase the partnership opportunity. This contention was not supported at all by any legal authority and both amount to constructive fraud, as the trial court found and in addition to the taking of Morgan's money and denying him any beneficial interest in any part of the partnership. Morgan received nothing after having paid the entire purchase price for everything appellants have in relation to Cliffs and the Property which defendants used for their sole benefit and to Morgan's detriment as he is left two years later with a zero percent return on his investment because, as the trial court found, appellants took everything the partnership ever had and every opportunity solely for themselves.

In addition, while appellants assigned error to almost every single finding other than the sun rises in the east, they did not take issue with the award of

attorney fees on the basis of the constructive fraud finding, did not discuss and provided no legal authority that what they did was not constructive fraud. The finding and conclusion stands and like at the trial court level, respondent is entitled to an award of his attorney fees on appeal under the constructive fraud doctrine of partner remedies.

CONCLUSION

For all of the reasons identified above, the judgment of the trial court should be affirmed and respondent awarded his costs and reasonable attorney fees herein.

This document contains 8,931 words.

May 17, 2022

Mark G. Passannante, WSB#25680
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the Respondents' Brief by first class mail and email on May 17, 2022 to the following party:

Jesse Conway
Conway Law, PLLC
1014 Franklin Street, #106
Vancouver WA 98660

May 17, 2022

Mark G. Passannante, WSB#25680
Of Attorneys for Respondent